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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted]32

GALE H. JOHNSON,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on November 28, 1967.

CITATION TO OPINIONS BELOW.

The orders of the United States District Court are unreported and are printed in Appendix A hereto. The opinion of the United States Court of Appeals is printed in Appendix B hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 28, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

Is a conviction in a criminal case constitutionally obtained when a law enforcement officer jails a trial witness subpoenaed by the accused, retaining the witness in custody for the duration of the trial, meanwhile reporting to court and counsel that the witness is confined as a patient in a mental institution?

May a state constitutionally shift the burden of proof to the accused in a criminal case by requiring the defendant to prove his absence from the scene of a crime as a condition for acquittal?

Is the conviction of an accused person vitiated by a prosecutor's employment of false evidence to obtain the conviction, absent a demonstration of complicity on the part of the prosecutor himself in the preparation of such false evidence?

CONSTITUTIONAL PROVISION.

The constitutional provision involved is Amendment 14, Sec. 1, Constitution of the United States: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Petitioner herein was charged with murder of a police officer in Burlington, Iowa, which fatality occurred on the morning of May 27, 1934, between 5:30 and 6:00 a.m. He pled not guilty to the indictment. There were no eyewitnesses to the fatality itself, and upon trial of the case petitioner presented eight witnesses who testified they saw

him in Des Moines, Iowa, some 164 miles away, during the time the alleged offense took place. These witnesses included the owner of a gas station who filled the tank of petitioner's car in Des Moines at about the time of the fatality, and the owner of a business establishment who saw the defendant in his place of business on the same morning.

Two key points of evidence were instrumental in the prosecution's case. First, two felons at the prison where the accused was being held pending trial testified they overheard the petitioner tell another prisoner named Yates that he, the petitioner, had committed the offense. The claimed conversation with Yates supposedly occurred in the prison "yard." This testimony was emphatically denied by Yates at the trial, who testified he never had such a conversation with the petitioner. Prison officials further testified on behalf of the defense that the petitioner was in the company of a guard at all times when out of his cell, and the guard was under strict orders to permit no conversation with the petitioner. However, the testimony of the two prisoners was supported by inculpatory notes allegedly prepared by the petitioner for secret passage to persons outside the penitentiary. These notes supposedly found their way into the hands of the two felons who overheard the reported statements to Yates, and the notes were produced at trial by the prosecution. Evidence recently presented in petitioner's habeas corpus hearing in Federal District Court demonstrates that these notes were fraudulent, were not prepared by the petitioner, and were false evidence. The respondent concedes that the introduction of such evidence at petitioner's trial was error, but claims that it was not prejudicial.

The second area of critical testimony at petitioner's original trial emanated from two witnesses who did not observe the fatality but who identified the defendant as near

the scene shortly thereafter. In an attempt to discredit their testimony, and to support the witnesses who placed the defendant in Des Moines at the time of the alleged offense, petitioner attempted to subpoena one Thomas Orsucci. Orsucci was originally identified by one of the Burlington witnesses as implicated in the homicide. The record does not clearly indicate that this was a positive identification, but it was apparently made with sufficient certitude to result in Orsucci being arrested and charged with first degree murder. The identification proved to be in error. In addition, prior to trial the Burlington authorities announced that Orsucci had been identified as being in a nearby "beer tavern" with petitioner the night before the fatality, a further circumstance rendering the trial testimony of Orsucci extremely relevant. After issuance of the subpoena for Orsucci, it was sent to the Polk County, Iowa, sheriff's office for service on the witness. Shortly thereafter, the trial court and petitioner were informed by the sheriff's office that Orsucci was unavailable in that he was institutionalized in the Clarinda Institution for the Insane. This was incorrect. In fact, Orsucci was confined at that very time in the Sheriff's custody at the Polk County jail. (Fed. D. Ct. Order, April 26, 1966, App. A, *infra*, p. 20; Fed. D. Ct. Order, Dec. 6, 1966, p. 3, n. 1, App. A, *infra*, p. 28; Record, Federal District Court Habeas Corpus Hearing 18-20, hereafter referred to as H. R.)

As heretofore indicated, various witnesses testified that the petitioner was in and about Des Moines on the morning of the homicide. At the close of petitioner's trial, the trial court directed the jury that in order to acquit the defendant on the basis that defendant may have been elsewhere at the time of the crime, defendant was required to prove he was elsewhere. The Circuit Court of Appeals found (1) that this jury charge placed the burden of proof on the accused, and (2) that such a charge is erroneous under the

great weight of authority. (Appendix B, *infra*, pp. 42-43.) However, the court declined to grant habeas relief, noting that the Supreme Court has not yet passed upon the question involved here. The jury charge in issue is printed in Appendix C hereto.

Petitioner's original trial concluded and a verdict was rendered on November 24, 1934. The jury rejected first degree murder, and instead rendered a verdict of guilty of murder in the second degree. On December 10, 1934, petitioner was sentenced to life imprisonment, which sentence he continues to serve. His conviction was affirmed on appeal. *State* v. *Johnson*, 221 Iowa 8, 264 N. W. 596. See also *State* v. *Johnson*, 221 Iowa 8, 21, 267 N. W. 91, correcting certain errors made by the Iowa Supreme Court in its first opinion.

Subsequently, the significant facts disclosed above were discovered, and to make these facts known to the court petitioner attempted to obtain an evidentiary hearing in state habeas corpus. His attempts were unsuccessful. His last effort in this regard resulted in a summary order of the Iowa Supreme Court denying relief. (Order, Iowa Sup. Ct., Jan. 6, 1966.) Petitioner thereafter filed a petition for federal habeas corpus on February 16, 1966. He demonstrated that he had exhausted his state remedies, and alleged that federally protected rights had been violated by certain unconstitutional practices which resulted in his confinement. An evidentiary hearing was held pursuant to *Fay* v. *Noia*, 372 U. S. 391, and *Townsend* v. *Sain*, 372 U. S. 293. At this hearing, a leading expert on handwriting analysis demonstrated that the notes produced by the state at petitioner's original trial were not written by the petitioner, contrary to the trial testimony of the state at that time. (H. R. 104-13, 120-21.) Prior to the habeas corpus hearing, these notes were also submitted to the state's present handwriting expert at the Bureau of Criminal Investigation, and

this expert fully agreed that the petitioner did not author the inculpatory notes. As a result, the respondent conceded that the introduction of the notes at petitioner's original trial was incorrect. (Resp. trial brief, Nov. 10, 1966, p. 11.)

Notwithstanding the cited evidence, the District Court denied habeas corpus relief. (D. Ct. Orders, April 26, 1966; Dec. 6, 1966.) In so doing, however, the District Court expressed major concern over the Iowa trial court's procedure in shifting the burden of proof to the accused, referring to the alibi instruction which did so as confusing and inconsistent. (Fed. D. Ct. Order, April 26, 1966, Appendix A, *infra,* pp. 23-4.) Subsequently, the District Court ordered the issuance of a certificate of probable cause under 28 U. S. C. 2253, directing specific attention to the jury charge which placed the burden of proof on the accused. (D. Ct. Order, Jan. 4, 1967.)

In considering this issue, the Court of Appeals pointed out that *Glover* v. *United States,* 147 F. 426, struck down as constitutionally impermissible an instruction similar to that employed in the instant case. The court added that a jury charge which shifts the prosecution's burden to the defendant is improper under the vast majority rule:

> The Supreme Court has not passed upon the validity of this type of instruction but the great weight of authority supports the view that such an instruction is erroneous. See *Thomas* v. *United States,* 9 Cir. 213 F. 2d 30; Comment, 49 Iowa L. Rev. 590. (Appendix B, *infra,* p. 43.)

While indicating serious question respecting the Iowa procedure involved here, the court appears to have been hesitant to grant habeas relief because of concern over another issue, retroactivity:

> We are not squarely confronted with retroactivity here as there has been no authoritative decisions by

> the Supreme Court determining the challenged instruction violated federally guaranteed constitutional rights. However, the reasoning of the Supreme Court cases dealing with retroactivity lends support to the determination that the conviction should not be set aside by reason of the alibi instruction. The cases hold that retroactive application of newly announced constitutional determinations to state prosecutions shall be determined on a case-to-case basis. (Appendix B, *infra*, p. 44.)

The court went on to affirm the judgment of the District Court.

Respecting the problems of the suppressed witness and the fabricated notes involved here, the court below stressed the fact that there was no clear demonstration that the prosecutor personally participated in the wrongdoing. After finding that the evidence indicated that witness Orcussi was concealed by the state, the Court of Appeals separated the actions of the sheriff and those of the prosecutor: "Such evidence establishes a prima facie case that the return of the Polk County sheriff is false. . . . The record indicates that the prosecuting attorney had no knowledge of the falsity of the return, and the defendant as a witness states that he has no evidence to the contrary." (Appendix B, *infra*, p. 40.)

The need for direct proof of prosecutorial complicity was deemed a controlling factor in connection with the false notes: "So far as we have been able to ascertain, all the Supreme Court cases setting aside convictions for want of due process by reason of the reception of false testimony are based upon the knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed." (Appendix B, *infra*, pp. 37-8.)

REASONS FOR GRANTING THE WRIT.

1. The ruling of the court below denying petitioner relief because he could not present direct evidence of the prosecutor's knowledge of false evidence or suppression of testimony is in conflict with the due process mandate established by this Court. The court below stated that all the Supreme Court cases setting aside convictions for want of due process are based upon knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed. (Appendix B, *infra*, pp. 37-8.) This proposition is in conflict with the decisions of this Court in *Brady* v. *Maryland*, 373 U. S. 83, and *Pyle* v. *Kansas*, 317 U. S. 213, as well as the Court of Appeals decisions in *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842, *Curran* v. *Delaware*, 259 F. 2d 707, and *Jones* v. *Commonwealth of Kentucky*, 97 F. 2d 335. Specifically, these cases indicate that suppression of evidence by the government vitiates the conviction of an accused person, whether that suppression is accomplished by the prosecutor or any other arm of the state.

Deception resulted in the instant case from the subpoena return made by the sheriff indicating that an important trial witness was confined in a mental institution. The witness sought by the defense was at that very time in the custody of the sheriff making the indicated return, a fact then unknown to the petitioner. The record is void of any evidence that transfer of the witness to a mental hospital was ever contemplated or took place.

This witness had been specifically requested by petitioner under an Iowa statute which authorizes the issuance of a subpoena for a defense witness at state expense if the

trial court finds that the desired witness to be "material and necessary" for the defense. Section 781.2, Iowa Code (1966), formerly Section 13880, Iowa Code (1931). The trial court ordered that the subpoena issue, foreclosing speculation that the requested witness was not material or necessary. This latter point was untreated by the Court of Appeals, although specifically raised in both the original and reply briefs of the petitioner in the court below.

Brady v. *Maryland* held that suppression by the prosecution of material evidence favorable to an accused violates due process. *Barbee* v. *Warden, Maryland Penitentiary* makes clear that the duty to desist from suppression and to disclose such evidence extends to all officers in the state's official process. See Comment, 42 N. Y. U. L. Rev. 764, 766 (1967). *Barbee* further indicates that in the cases wherein such an officer actively suppresses requested evidence the sentence will be set aside, even without a showing of prejudice by the defendant.

The decision of the court below conflicts with these important precedents. The question of whether a conviction may be maintained when a key trial witness for the defense has been suppressed under the circumstances disclosed here is an important one. This is especially so where the subpoena for that witness is authorized only after the defense demonstrates to the trial court, which is in the best position to make such a judgment, that the witness is material and necessary. No discovered suppression of evidence case appears to involve the concealment of a witness specifically known to the accused and requested by him, and the subject cause thus appears to pose an original question of high import. Settlement of this significant problem appears plainly in the interest of the administration of criminal justice.

2. The court below decided that petitioner's conviction

was not vitiated by the reception of false evidence and testimony respecting inculpatory notes allegedly written by the petitioner. Although these notes have now been repudiated by both the state and the defense, the court stated that there was no substantial evidence to show that the trial prosecutor knew of the falsity of the evidence. (Appendix B, *infra*, p. 38.) Thus, the court determined, there was no basis to set aside the conviction. In so ruling, the decision appears clearly erroneous and in conflict with *Brady* v. *Maryland*, 373 U. S. 83, and *Jones* v. *Commonwealth of Kentucky*, 97 F. 2d 335.

The court below does not seem to question the significant role played by the false evidence in petitioner's trial. Indeed, such a position would be difficult to take in view of the record. The subject of the controverted notes occupied all or part of the testimony of five witnesses presented by the state, and the prosecutor in closing argument pressed home with considerable persistence the "fact" that Gale Johnson authored the notes in question—a "fact" now disclosed to be untrue. (Original trial record, pp. 166-205, 353-54, 355.) Rather, the court below rejected petitioner's claim for the expressed reason that all the cases setting aside convictions by reason of the reception of false testimony are based upon knowledge of the prosecutor that the evidence received is false. It is submitted that this view of the law and the attendant ruling is clearly incorrect in view of this Court's pronouncements in *Brady* v. *Maryland*. That case, as well as *Jones* v. *Commonwealth of Kentucky*, illustrates that the due process mandate in the false evidence cases "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U. S. at 87. See Note, 74 Yale L. J. 136, 142 (1964). The view of the court below, to the effect that there is no unsettling vice in the employment of tainted evidence absent a showing of prosecutorial complicity,

should be corrected. The fundamental interpretations announced by this Court proscribing the use of false evidence constitute bulwarks for American justice, and their proper application in cases such as this one form crucial protections for all accused persons.

The error of the lower court can be more fully appreciated with some insights into the setting in which the false evidence was employed by the prosecution. At petitioner's original trial, testimony developed that the prosecutor had gone into the prison and offered prisoners a sum of money, to wit $25.00, if they would assist him by discovering and telling him the names of defendant's trial witnesses. (Original trial record, pp. 281, 298-99, 307, 311, 353.) Two of the prisoners went further, however, and produced the incriminating notes allegedly written by the petitioner. These notes, when introduced for jury consideration, presented the petitioner as a person seeking to fabricate an alibi with friends outside the penitentiary, an especially damaging impression to create in a case where the credibility of the petitioner's alibi witnesses would be decisive. The state's erroneous introduction of the false notes, supported at that time by expert testimony which has now been discredited, formed a major link in that chain of prosecution evidence. The situation was further complicated by the fact that the prosecutor held these notes for several months, giving the accused notice of their existence only on the eve of trial. Iowa law requires that the accused be given notice of the state's evidence prior to trial, and in connection with other portions of the state's case the accused received such notice several weeks in advance of the trial. Notice that the false notes would be used was withheld almost until the last legally possible moment, affording petitioner scarce opportunity to give the evidence the detailed type of screening by an expert which would have revealed its falsity.

3. An important question of federal law is raised by the procedure which was employed in petitioner's trial to shift the burden of proof to him. The procedural device which accomplished this result was an instruction directing the jury that the petitioner must prove by a preponderance of the evidence that he was elsewhere at the time of the crime in order to be acquitted under that theory. *Glover* v. *United States,* 147 Fed. 426, strikes down an almost identical instruction on fundamental constitutional grounds, ruling that such a jury charge is antagonistic to basic notions of burden of proof and reasonable doubt in criminal cases.

Indicating the necessity for settlement by this Court, the court below stated that although the Supreme Court had not passed upon the validity of this type of jury charge, the great weight of authority condemned such a charge as erroneous (Appendix B, *infra,* p. 43). Again, the court below stated that there has been no authoritative decision by the Supreme Court that the challenged instruction violates federally guaranteed constitutional rights. It would appear that the court below was inviting direction from this Court on the problem. Certainly this is an important question which has not been, but should be, settled by this Court.

Glover v. *United States* and *Thomas* v. *United States,* 213 F. 2d 30, treated exactly the problem posed by petitioner here. Both cases invalidated burden-shifting jury instructions of the type employed in petitioner's trial. The *Glover* case is especially in point, and it castigates such an instruction with these words:

> The underlying vice in the foregoing charge of the court is in the assumption that in respect of the alibi the burden of proof "by a preponderance of evidence, that is, by the greater and superior evidence," shifted to the defendant. It loses sight of the fundamental

> rule in criminal procedure that the defendant is presumed to be innocent of the offense with which he is charged; that this is a continuing presumption which attends him like a guarding spirit throughout the ordeal of his trial, and imposes upon the prosecution the burden of overcoming such presumption by such weight of evidence as will satisfy the minds of the triers beyond a reasonable doubt of the defendant's guilt. This reasonable doubt in his favor applies to the evidence in its entirety and necessarily to any part of it. 147 Fed. at 431.

The decision in *Glover* is the leading federal authority on the question considered, and its impact on American law has been widespread. See *Thomas* v. *United States,* 213 F. 2d at 33-34 for collected cases. The decision of the court below appears in conflict with the reasoning of these cases. It is true that *Glover* and *Thomas* treated the instant problem in the context of federal trials. But their reasoning does not turn on some special feature of law applicable in federal courts. Rather, they strike down alibi instructions which shift the burden of proof to the accused because such a jury charge violates basic constitutional rights of the accused. Certainly these rights are equally destroyed when a nearly identical instruction is employed in a state trial.

The treatment of burden of proof in the alibi cases has been the subject of considerable controversy in Iowa. The forceful dissenting opinions in *State* v. *La Mar,* 151 N. W. 2d 496, 504 (Iowa 1967) and *State* v. *Stump,* 254 Iowa 1181, 1203, 119 N. W. 2d 210, 223 (1963), underline the disagreement. The Iowa approach is followed in only a few states, and has been severely criticized by the commentators. See Comment, 49 Iowa L. Rev. 590 (1964); Underhill, Criminal Evidence, Sec. 441 (5th ed. 1956). See also 4 Wharton, Criminal Law and Procedure 772 (1957); McCormick, Evidence 683-84 (1954); Chamberlayne, Evidence, Sec. 973 (1911). Wigmore's current listing indicates that five juris-

dictions, including Iowa, shift the burden to the accused on the question of alibi. 9 Wigmore, Evidence, Sec. 2512, n. 3 (1964 Supplement). See also 1 Wharton, Criminal Evidence 68-70 (12th ed. 1955). It does appear that Iowa is in a slim and shrinking minority on this question. As indicated in *Leland* v. *Oregon*, 343 U. S. 790, 798, the fact that a contrary practice is followed in the vast majority of states is not conclusive that the majority practice is the one which accords with due process, but that fact is plainly worth considering.

The practice of shifting the burden of proof to the accused exists in only a few states, but in those states the impact of this procedure on the rule of reasonable doubt is dramatic. Evidence presented by defense witnesses may raise a reasonable doubt of the accused's presence at the scene of a crime. Normally, this would be sufficient to acquit. However, the jury is then told that they may not acquit on such reasonable doubt, but may acquit only if the accused has gone further and has proven by a preponderance of the evidence that he was elsewhere. It becomes apparent why the leading authorities on the law of evidence term such a direction to the jury legally incongruous and well calculated to confuse the understanding of the jurors. This procedure was especially prejudicial in the case at bar, where the credibility of petitioner's alibi witnesses was already undercut by the state's production of false evidence.

In addition to the above problem, a further anomaly presents itself under the Iowa rule:

> If the defendant testifies that he was not present at the scene of the crime, no burden of proof is cast upon him and his testimony raises only the question of credibility. Thus, the jury could acquit the defendant on the basis of alibi alone when the only proof is defendant's testimony. However, if he calls witnesses to corroborate his alibi, the defendant is said to have assumed the offensive and the burden of proof by a pre-

ponderance of the evidence rests upon him. Comment, 49 Iowa L. Rev. at 596.

Two features of the lower court's opinion require comment at this point. First, the Federal District Court cited *Leland* v. *Oregon* as supportive in its order rejecting habeas relief, a citation referred to by the court below. It is to be noted that the concept involved in *Leland*, that of the accused's sanity, is totally dissimilar from the proposition involved here. In separating the concepts of insanity and alibi, Underhill, Criminal Evidence, Sec. 441 (5th ed. 1956) sets forth the following pointed statement which makes clear the unrelated character of the problems:

> Some courts treat alibi, like insanity, as an affirmative defense and cast on the defendant the burden of establishing it, either by a fair preponderance of the evidence or to the reasonable satisfaction of the jury, although never beyond a reasonable doubt. It seems fallacious to call alibi an affirmative defense and place the burden of proving it on defendant. In most criminal cases the state must prove that accused was present at the scene of the crime, and the defendant may negate this in any way that he can, including the introduction of testimony that he was not present because he was elsewhere. Proof of alibi thus appears to negative an essential element of the crime rather than set up affirmative matter. Further, it is difficult to compare alibi with insanity. The reason that some jurisdictions place on defendant the burden of proving insanity is that insanity is a departure from the norm; people are presumed to be sane. There is obviously no presumption that the defendant was present at the scene of the crime.

A second feature of the lower court opinion requiring mention is the apparent confusion over the concept of retroactivity. The court, intimating that the questioned jury charge may be unconstitutional, questioned whether such a rule would inure to the benefit of this petitioner. This

analysis appears to overlook the guiding principles set forth in *Stovall* v. *Denno,* 388 U. S. 293. The *Stovall* decision points out that litigants in cases which make clear a constitutional requirement always obtain to retroactive benefit of the rule, even though such rule may be prospectively applied for subsequent litigants. Petitioner here has presented an original question of marked constitutional importance, and respectfully submits that a holding by this Court in accord with *Glover, Thomas,* and allied cases would unquestionably apply to him, based upon "sound policies of decision making, rooted in the command of Article III of the Constitution . . ." *Stovall* v. *Denno,* 388 U. S. at 301. The question of retroactive application does not occupy the Court at this time. Should the Court in a future case wish to limit any announced rule to cases heard after this decision, the Court certainly may do so. Nothing in the concept of retroactivity would appear to deny Gale Johnson the benefit of the Court's ruling on the alibi question presented, or to limit the Court in other future cases.

Petitioner disputes the propriety of a trial court shifting the burden of proof in a criminal case to the accused. His contentions in this respect form an isue of constitutional proportions. *Glover* v. *United States* condemns the erroneous allocation of the burden of proof wrought by the trial court's jury charge, and indicates that an instruction which does so is at war with the presumption of innocence, a basic tenet of Anglo-American jurisprudence.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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